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NO. 99-1814

MOTION FILED

JUN – 8 2000

IN THE
SUPREME COURT OF THE UNITED STATES

COMMITTEE FOR ENVIRONMENTALLY SOUND DEVELOPMENT, INC., NORTH RIVER COMMUNITY ENVIRONMENTAL REVIEW BOARD, WEST VILLAGE COMMITTEE, COALITION FOR A LIVABLE WEST SIDE, GEORGIO CAVAGLIERI, JOHN L. BUNCH, JR., PHYLLIS GUNTHER, HARRIET WEISSBERGER and OLIVE FREUD,

Petitioners,

-against-

THE CITY OF NEW YORK, RUDOLPH GIULIANI, as Mayor of The City of New York, THE METROPOLITAN TRANSPORTATION AGENCY and TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY,

Respondents.

# CITY RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## COUNTER STATEMENT OF THE QUESTION PRESENTED

Did the United States Court of Appeals for the Second Circuit correctly affirm the denial by the District Court for the Southern District of New York of plaintiffs' application to replead their purported claim under the Clean Air Act (CAA), 42 U.S.C. §7401, et. seq., based on which plaintiffs sought to enjoin the sale and redevelopment of the Coliseum site at Columbus Circle in Manhattan? The ruling on whether to permit repleading involved construction of the applicable New York State Implementation Plan (SIP) for compliance with Clean Air Act (CAA) carbon monoxide (CO) control standards.

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**CITY RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

## COUNTER STATEMENT OF THE CASE

In this action, petitioners sought a declaratory judgment that the City failed to comply with the Clean Air Act, the New York State Environmental Quality Review Act (SEQRA), Environmental Conservation Law (ECL) § 8-0101, et. seq., and the New York City Charter, § 197-c, Uniform Land Use Review Procedure (ULURP),[1] with

[1] In the First Opinion and Order of the District Court, dated December 1, 1998 (not included in Petitioners' Appendix before this Court), pendent jurisdiction of the state law claims was denied, based on the dismissal of the federal claims. The state law claims were litigated to final determination adverse to plaintiffs before the New York State courts. In a detailed opinion, Supreme Court, New York County, by Decision and Judgment, dated August 2, 1999, dismissed plaintiffs' SEQRA claim, which was largely that the Final Environmental Impact Statement (FEIS) for the proposed Coliseum redevelopment was inadequate because it did not analyze the effect of the proposed redevelopment on CO levels at Madison Avenue and 59th Street, which had been identified as the site of a potential CO exceedance in the late 1980s. The defendants' position was that updated modeling techniques warranted analysis of other locations to determine the effect of the proposed project on CO levels, and, in any event,

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there had been no exceedance of the National Ambient Air Quality Standard (NAAQS) for CO anywhere in Manhattan since 1991. Supreme Court, New York County, also rejected petitioner's claim that the sale of the Coliseum site was subject to ULURP, which applies to property of the City of New York, a claim made despite a prior ruling by the New York Court of Appeals in Jo & Wo Realty Corp. v. City of New York, 76 N.Y.2d 962 (1990), that the site was the property of the Triborough Bridge and Tunnel Authority (TBTA), which is not an agency of the City of New York, and thus a contract for the sale thereof was not subject to City bidding procedures.

The Appellate Division, First Department, by Decision and Order, dated January 11, 2000, Committee for Environmentally Sound Development, Inc., et. al. v. City of New York, 700 NYS2d 694, unanimously affirmed the Judgment of Supreme Court, New York County, stating:

> The court properly determined that the sale and dispositon of the Coliseum site was not subject to the Uniform Land Use Review Procedure (*See*, New York City Charter § 197-c; *Jo & Wo Realty Corp. v. City of New York*, 76 N.Y.2d 962, *see also, Matter of Waybro Corp. v. Bd. of Estimate of the City of New York*, 67 N.Y.2d 349, and that respondents complied with State Environmental Quality

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respect to the proposed sale and redevelopment of the Coliseum site at Columbus Circle in Manhattan, which is owned by the Triborough Bridge and Tunnel Authority (TBTA). Petitioners sought a consequent injunction against that sale and redevelopment.

The CAA, 42 U.S.C. §7604, provides that "any person may commence a civil action on his own behalf-"

> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to have violated (if there is evidence that the

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> Review Act by identifying the relevant areas of environmental concern and by then taking the required "hard look" at them (*see, Matter of Kahn v. Pasnik*, 90 N.Y.2d 569, *Matter of Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 417, 503 N.Y.S.2d 298, 494 N.E.2d 429).

By Order dated April 6, 2000 (2000 NY Lexis 552), the New York Court of Appeals denied leave to appeal the Decision and Order of the Appellate Division, First Department.

> alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation under this chapter.

Under 42 U.S.C. §7604(f) an "emission standard or limitation" includes "(1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard."

Under the CAA, the Environmental Protection Agency (EPA) promulgates the national ambient air quality standards (NAAQS), 42 U.S.C. § 7409. Each state must develop, subject to EPA approval, a State Implementation Plan (SIP) to implement, maintain and enforce the NAAQS for each regulated pollutant. 42 U.S.C. § 7410. See Coalition Against Columbus Center v. City of New York, 967 F.2d 764, 766-767 (2d Cir. 1992); Wilder v. Thomas, 854 F.2d 605, 608-610 (2d Cir. 1988) cert. den. 489 U.S. 1053 (1989). Once a SIP is adopted by the EPA it becomes federal law. United States v. General Motors Corp., 876 F.2d 1060, 1063 (1st Cir. 1989) affd 496 U.S. 530 (1989).

The applicable New York State SIP relies on environmental impact statements to determine if a project has the potential to cause an exceedance of the NAAQS for CO. An exceedance occurs when in a calendar year there is more than one maximum concentration exceeding nine parts per million as a combined average over an eight hour period (See 40 CFR § 50.8(a)(1); NY State 1992 SIP, p. 10; Coalition Against Columbus Center v. City of New York supra, 967 F.2d at 768 (2d Cir. 1992). Specifically, the applicable 1992 SIP states, under "Savings Provisions", § 4.0, that the prior SIP committed the State and City to:

"Follow a specified procedure for the ongoing identification and mitigation of hot spots. This procedure entailed a commitment by the City to review Environmental Impact Statements (EIS) and assure that any site at which an EIS identifies a violation or exacerbation of the carbon monoxide standard is brought into attainment of the standard." Section 4.2.2 of the 1992 SIP states: "The 1984 SIP commits to a procedure which depends on EISs to identify additional sites with a potential for exceedance of the CO standard. The exceedance identification process committed to in the SIP has been followed." Section 4.4, "Revised Procedures for Identifying New CO Exceedances," states:

> The 1984 SIP [3.6a] states "To further ensure that the carbon monoxide standard is attained in New York City, if any EIS for a project identifies a violation or exacerbation of the carbon monoxide standard, then the City commits to assure that mitigating measures will be implemented by the project sponsor or City, so as to provide for attainment of the standard by December 31, 1987 and maintenance of it thereafter."
>
> The provision for a specific date for attainment in this procedure is revised in this present SIP submittal from December 31, 1987 to December 31, 1995 to reflect the requirements of The Act.
>
> The City of New York will continue to follow the procedure for identifying potential exceedances resulting from new projects and/or disclosed in the

> environmental review process. The City will continue to assure that project sponsors or the City will mitigate potential exceedances caused by a project. Exceedances identified in the environmental review process which are not caused by the project will be subject to appropriate control measures.

**First Decision and Order of the District Court**

In an Opinion and Order dated December 1, 1998, (not included in Petitioners' Appendix before this Court), the District Court dismissed the complaint. Citing Wilder v. Thomas, supra, 854 F.2d at 613, the Court noted that pursuant to 42 U.S.C. § 7604(a) (1) and (3), the plaintiffs could invoke the court's jurisdiction only to enforce specific provisions of the CAA or specific provisions of an applicable SIP, and they had to identify with some particularity the respects in which compliance with the provision is deficient, citing Coalition Against Columbus Center v. City of New York, supra, 967 F.2d at 769. There was no private right of action to enforce a NAAQS, which is not included within the statutory definition (42 USC 7604(f)) of an "emission standard or limitation". In prior litigation concerning this site, the Second Circuit Court ruled that the mitigating measures for the 59th Street "hot spot"[2] identified in an EIS done in the early 1980s were sufficient. Coalition Against Columbus Center v.

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[2] A "hot spot" is a location with the potential to exceed the CO standard. Coalition against Columbus Center v. City of New York, supra, 967 F.2d at 768.

City of New York, supra, 967 F.2d at 771.[3] The current FEIS did not identify any violation or exacerbation of the CO standard. "Accordingly, no mitigation obligation attaches to the 1998 project and the City cannot have an obligation to mitigate something that, for these purposes, does not exist." The SIP designates the SEQRA EIS process as the mechanism for reviewing the environmental impacts of projects like the one at issue. SEQRA establishes a set of procedures designed to assure that an action's potentially significant environmental consequences are disclosed from the inception of the planning processes; and the extent to which the procedures have been followed in any particular case is subject to state judicial review, citing Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d 400, 416, 417 (1986); Wilder v. Thomas, supra, 854 F.2d at 619. A claim that an EIS was inadequate did not state a federal cause of action under the CAA. The claim that the 59th Street "hot spot" should have been analyzed under the current FEIS was simply a challenge to the preparation of the EIS, which was a state law claim.

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[3] The District Court noted that the Coliseum project was not a "stationary source" under 42 U.S.C § 7602 (j), as it would not directly emit the regulated pollutants . Vehicular traffic associated with the project could not render it a "stationary source," because under 42 U.S. C. § 7602 (z), emissions resulting directly from an internal combustion engine for transportation vehicles are excluded from the definition of "stationary source", citing Village of Oconomoc Lake v. Dayton Hudson Corp., 24 F.3d 962, 963 (7th Cir. 1994) cert. den. 513 U.S. 930 (1994) ("vehicular emissions are not attributed to the buildings served as points of origin or destination").

**District Court's Order Denying the Motion to Amend the Complaint**

By Order dated March 9, 1999 (Appendix B), the District Court denied the motion to amend the complaint. The District Court found to be legally insufficient the allegations that the City violated SIP § § 4.0(2) and 4.4. The District Court stated that § 4.0(2) simply continued the commitments outlined in the 1984 SIP and does not contain its own specific strategy or commitment on which the plaintiffs may sue. Furthermore, the allegations concerning omissions in the FEIS were essentially the same allegations about allegedly omitted hot spots, which allegations were held to be insufficient in the original complaint. With respect to § 4.4 of the SIP, as explained in the earlier decision, no duty to mitigate an exceedance arose since the environmental review process had not identified any exceedance that would be caused by the development of the Coliseum site. Any inadequacies in the environmental review process were not the proper subject of a citizen suit under the CAA.

The District Court also rejected plaintiffs' contentions that a provision of § 4.4 of the 1992 SIP required additional analysis of the proposed project's effect on CO levels. That provision states:

> The State and City commit to develop a broader alternative procedure to identify potential areas at risk of exceedance of the CO standard, taking into account a wider database, consistent with all relevant methodologies, including: modeling, data

collection, and growth projection. This new procedure will become part of the CO Maintenance Plan which must be submitted at the time that the State requests redesignation of the nonattainment area as an area which has attained the NAAQS for CO.

The District Court ruled that this provision was not in effect and would become effective in the future only if New York State requested redesignation of New York City from a nonattainment area to one which had achieved attainment (Appendix B, p. 14a).

As the proposed amended complaint failed to state a claim on which relief may be granted, the motion to amend the complaint was denied and the action dismissed, as effected by a Judgment, filed March 12, 1999.

## DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

In a Summary Order, dated and filed December 22, 1999 (Appendix A), the United States Court of Appeals for the Second Circuit affirmed the judgment of the District Court.

Reviewing the proposed amended complaint as if it had been filed and then subjected to review, Wilder v. Thomas, supra, 854 F.2d 613, and reviewing the dismissal of the complaint de novo, Sykes v. James, 13 F.3d 515, 518-519 (2d Cir. 1993), the complaint failed to state a claim upon which relief may be granted (Appendix A, p.

6a). In addition to adopting the reasons of the District Court as to why the proposed amended complaint was deficient, the Circuit also rejected plaintiffs' argument that § 4.4 of the SIP required a review for potential CO exceedances from a project beyond that in the EIS for the project, and plaintiffs' contention that the potential for an increase in CO levels rather than for a potential exceedance of the CO NAAQS level, required mitigation measures. The Circuit stated, Appendix A (8a):

> It seems clear to us that under this provision the City's obligation to mitigate CO levels is triggered only where an exceedance of the CO standard is created or an already existing exceedance is exacerbated, not where CO levels increase but stay below the standard. To hold otherwise would establish an entirely standardless obligation, requiring mitigation for *any* increase in CO levels. Plaintiffs' argument on this point is without merit.

In August 1999, after briefing of the case, but before oral argument before the Second Circuit, the State of New York Department of Environmental Conservation (DEC) submitted to EPA, pursuant to 42 U.S.C. § 7407 (3) (D), a SIP plan revision proposing to redesignate the New York Metropolitan Area as an area which is in attainment of the CO NAAQS, and, as required by 42 U.S.C. § 7505 (a) in connection with a redesignation request, a Maintenance Plan to maintain the level of compliance upon which the redesignation request was based. These materials were provided to the Second Circuit prior to oral argument. In footnote 4 of the Circuit's opinion (Appendix A, p. 6a), that Court stated that with respect to the portion

of plaintiffs' claim under 4.4 of the SIP which is premature, the Court expressed no view as to whether that claim may be brought at some later date.

## REASONS FOR DENYING THE WRIT

The Second Circuit correctly determined that the proposed amended complaint failed to state a CAA claim upon which relief may be granted. As that Court stated in Wilder v. Thomas, supra, 854 F.2d at 613: "In order to avoid either overburdening the courts or unduly interfering with implementation of the act, however, congress carefully circumscribed the scope of the provision by authorizing citizens to bring suit only for violations of specific provisions of the act or specific provisions of an applicable implementation plan. . . . By the specificity requirements congress sought to establish 'an objective evidentiary standard [that] would have to be met by the citizen who brings an action under [§ 7604]' and therefore eliminate the need for 'reanalysis of technological or other considerations at the enforcement stage'. See Citizens Ass'n of Georgetown the Committee of 100 on the Fed City v. Washington, 535 F.2d 1318, 1322 (D.C. Cir. 1976)." As stated in Coalition Against Columbus Center v. City of New York, supra, 967 F.2d at 769: "The citizen suit provision of the Clear Air Act creates a limited private right of action to enforce the Act's provisions. . . To state a claim under the citizen suit provision a plaintiff must allege a violation of 'a specific strategy or commitment in the SIP and describe, with some particularity, the respects in which compliance with the provision is deficient.' Council of Commuter Organizations v. [MTA], 683 F.2d [663] at 670 [(2d Cir. 1982)]; see Wilder II, 854 F.2d at 610; Action for Rational Transit v. West Side Highway Project, 699 F.2d

614, 616 (2d Cir 1983)." Accord: Conservation Law Foundation, Inc. v. Busey, 79 F.3d 1250, 1258 (1st Cir. 1996).

A violation of the National Ambient Air Quality Standard (NAAQS) is not addressable by a citizen suit, because a NAAQS standard itself is not an emission standard or limitation under 42 U.S.C.§ 7604(a)(1) and (f)(3). Coalition Against Columbus Center v. City of New York, supra, 967 F.2d at 769; Conservation Law Foundation v. Busey, supra, 79 F.3d at 1258; Wilder v. Thomas, 854 F.2d at 613-616; League to Save Lake Tahoe, Inc. v. Trounday, 598 F.2d 1164, 1173 (9th Cir. 1979) cert. den. 444 U.S. 943 (1979) (a claim that a project was erroneously approved although it could cause a violation of ambient air quality standards did not constitute a SIP violation addressable by citizen suit under the CAA. Such a claim blurred the distinction between the NAAQS and an emission standard or limitation and would improperly sanction federal jurisdiction based solely on a prospective violation of the NAAQS, for which the CAA provided no basis. Thus in Wilder v. Thomas, supra, 854 F.2d at 614, the court held insufficient a CAA citizen suit based on an alleged failure to eliminate CO hot spots. Such a claim eliminated the distinction between the NAAQS, which could not be addressed by a citizen suit, and measures that are designed to attain the NAAQS, which, if contained in a specific provision of a SIP, are the permissible subject of a citizen suit. This interpretation adhered to the statutory language of the CAA citizen suit provision while effectuating both the congressional purpose of fostering enforcement and the equally important purpose of

providing specific objective standards for citizen suits. Wilder v. Thomas, supra, 854 F.2d at 616.

While in Wilder and Coalition Against Columbus Center, supra, 967 F.2d 764, the EIS for the projects at issue revealed "a violation or exacerbation of the CO standard", activating the City's commitment to assure that mitigation measures would be implemented by the project sponsor or the City, in the instant case the project EIS did not indicate any exceedance or potential exceedance of the CO standard. The EIS indicated a significant air quality impact only in that under one proposal for developing the site, the 8-hour CO concentration would increase by 1 ppm. at two receptor locations, which was a de minimis increase under City standards but would exceed New York State de minimis criteria. This impact would be mitigated by traffic control measures. Since the EIS did not indicate any "violation or exacerbation of a CO standard" (§ 4.4, 1992 SIP, incorporating 3.6(A), 1984 SIP) or any potential exceedance resulting from the new project, by the express terms of the SIP, no mitigation was necessary. The SIP did not activate any requirement based on the EIS for this project. Petitioners' complaint concerning air quality was precipitated solely by the proposal to redevelop the Coliseum site. Under the SIP, the mechanism for evaluating the potential for CO exceedance caused by an indirect source project is the EIS. As stated by the court in Atlantic Terminal Urban Renewal Area Coalition v. New York City Department of Environmental Protection, 740 F.Supp. 989, 990, (S.D.N.Y. 1990), the SIP provisions committing the City to mitigation measures if an EIS identifies a violation or exacerbation of the CO standard "has a simple conditional construction: if X occurs, then the

City commits to do Y." The condition that triggers the City's commitments is the identification of a violation or exacerbation of the NAAQS. Since the EIS in this case did not indicate a violation or exacerbation of the CO standard or an exceedance or potential exceedance thereof, X has not occurred, and there is no obligation to do Y (adopt mitigation measures).

The instant ruling of the Circuit was consistent with the prior holding of that Court in Wilder. In essence, petitioners challenged the sufficiency of an EIS and attributed to the City a nonexistent obligation under the SIP to make an "independent review" of the air quality impacts of a project. In Wilder v. Thomas, supra, both the District Court and the Second Circuit rejected the claim that the City or State environmental agencies had a duty to conduct a "SIP review" of the project at issue. There was no such requirement in the SIP. Id. 659 F.Supp. at 1506. What the SIP required was mitigation measures if an EIS indicated a violation or exacerbation of the CO standard. The Second Circuit stated: "Finally, plaintiffs' sixth claim, which alleges in essence that the DEC and DEP should have reviewed the project EIS prior to approval by the UDC, must also fail. First, the SIP does not contain a requirement that DEC or DEP make an 'SIP' review of a project before the lead agency, in this case UDC, approves it". Id. 854 F.2d at 621.

The SIP relies on the EIS process to disclose violations, exacerbations and potential exceedances. Once approved by EPA, the SIP constitutes Federal law, and the courts cannot rewrite it to impose additional requirements, see Delaware Valley Citizens Council for Clean Air v.

Davis, 932 F.2d 256, 266 (3rd Cir. 1991), or enforce obligations not contained therein, Plan for Arcadia, Inc. v. Anita Associates, 501 F.2d 390, 392 (9th Cir. 1974) cert. den. 419 U.S. 1034 (1974), which would result from adoption of plaintiffs' erroneous interpretation of the SIP as requiring independent government review of an EIS with respect to findings therein as to air quality impacts.

Plaintiffs also failed to provide any reason to the Second Circuit as to why New York State's filing with the EPA of a request to redesignate the New York Metropolitan Area as an attainment area, with a maintenance plan including a procedure to identify New York City areas at risk of exceedance of the CO standard, provided a basis for a claim under the CAA. The filing of an attainment demonstration, including procedure to identify New York City areas at risk of exceedance of the CO standard, constituted compliance with that provision in § 4.4 of the SIP requiring that such a procedure be part of the CO Maintenance Plan submitted as part of the attainment demonstration and redesignation request. The EPA has not approved the attainment demonstration and redesignated New York City as an area where compliance with the CO standard has been attained, nor has the EPA approved the State Maintenance Plan. The CAA specifically states that a request for redesignation must be approved by the EPA to be effective, 42 U.S.C. 7407 ((F) (4), and can be approved only if the request meets the standards set forth in 42 U.S.C. § 7407(E). The mere submission thereof does not affect the enforceability of the applicable implementation plan. 42 U.S.C. § 7407 (3) (D). The Maintenance Plan submitted with a redesignation request is not in effect until the redesignation and such a

SIP revision are approved by the EPA. 42 U.S.C § 7505a (c). It is well established that until EPA approves the Maintenance Plan it is not in effect. United States v. General Motors Corp., 876 F.2d 1076 (1st Cir. 1989), affd 496 U.S. 530 (1990); State of Ohio v. Ruckelshaus, 776 F.2d 1333 (6th Cir. 1985) cert. den. 476 U.S. 1169 (1986). The CAA and case law make clear that the adequacy of the redesignation request and maintenance plan are matters to be determined in the first instance by the EPA and not by the courts. Accordingly, the Second Circuit correctly held that any claim based on the proposed maintenance plan, and the procedure therein for identifying City areas at risk of an exceedance of the CO standard, is premature.

A facial review of the documents provided to the Second Circuit, (no part of which being provided as an Appendix to this Court) also shows that these provide no basis whatsoever for any claim that the proposed project should be enjoined as in violation of the CAA. Petitioners provided no explanation to the Second Circuit, and offer none to this Court, as to how this proposed Maintenance Plan provides any basis for a claim that the project is not in compliance with the CAA, notwithstanding the requirement that a legally sufficient claim under the limited citizen private right of action provisions of the CAA must allege a violation of a specific strategy or commitment in a SIP and describe with some particularity the respects in which compliance with the provision is deficient. Coalition Against Columbus Center v. City of New York, supra, 967 F.2d at 969; Council of Commuter Organizations v. MTA, supra, 683 F.2d at 670; Wilder v. Thomas, supra, 854 F.2d at 610; Action for Rational Transit v. West Side Highway

Project, supra, 699 F.2d at 616; Conservation Law Foundation v. Busey, supra, 79 F.3d at 1258.

The document in question recites air quality monitoring results at locations in New York City where in the past CO concentrations have been highest, indicates no current exceedance of the CO standard, and includes projections based on modeling, predicting that despite a projected increase in vehicular travel, improvements in gasoline and replacement of older polluting vehicles with newer cleaner ones will result in maintenance of the CO standard. The plan provides for continued monitoring and modeling so that contingency measures can be activated in the event measurements or modeling indicate or predict currently unexpected increases in CO emissions. The use of EIS documents to identify potential for CO exceedances arising from specific projects is continued (p. 20, Maintenance Plan).

The procedure to identify New York City areas at risk of exceedance of the CO standard identifies one area in downtown Brooklyn and one in Long Island City, where in prior years there were CO exceedances, as still being at risk for CO exceedance. The procedure relies on monitoring of vehicle miles traveled (VMT), which is done on a county-wide basis, as a predictor, as well as on other traffic studies, and on review of plans for development. The City will identify areas where there is expected to be significant new development or redevelopment in the next three to five years, and if the total construction in such an area exceeds recent construction by at least 20%, that area also will be considered at risk for CO exceedance. This development review process will be repeated every three years. If a

commercial project containing over 300,000 square feet is planned close to an area previously identified as at risk of exceedance, the area will be extended to include the planned development. The information concerning such development will be reviewed on a yearly basis.

This monitoring and modeling program provides no basis for any claim that the sale or development of the Coliseum site violates an emission standard or limitation. Indeed, this specific project's prospective effect on CO levels was individually reviewed in a site specific EIS, and no CO exceedance was projected. In a State court suit in which these same petitioners challenged the adequacy of the EIS, particularly with respect to the evaluation of the project upon traffic and consequent CO levels, the New York State courts held that the EIS complied with SEQRA. Committee For Environmentally Sound Development v. City of New York, supra, 700 NYS2d 694, lv. den. _NY2d_ (April 6, 2000). Such state judicial review is an appropriate means for determining the sufficiency of an EIS evaluation of the potential for CO exceedance resulting from the project. Wilder v. Thomas, supra, 854 F.2d at 616-619. This site specific review, under assumptions which did not contemplate City compliance with the CO NAAQS, was more stringent than the measures in the proposed maintenance plan, which is not in effect unless and until approved by EPA, which assume that the City is in compliance with the CO standard, and which seek to maintain compliance with that standard. Furthermore, even under the proposed new Maintenance Plan, a site specific EIS will continue to be relied upon to determine whether a specific project presents a risk of a CO exceedance (Maintenance Plan, p. 20). The provisions in the proposed

Maintenance Plan to designate areas of New York City for monitoring and modeling attention have no bearing on the issue of whether this specific Coliseum project proposal presents any potential for a CO exceedance, (and the site specific EIS found no such potential). This proposed procedure to identify areas of the City for monitoring and modeling attention provides no basis to enjoin this project, even if these provisions were presently in effect. There is nothing either in the proposed Maintenance Plan or the currently applicable SIP which provides a basis to enjoin construction of the building simply because the building may attract increased vehicular traffic. As noted by the District Court, the CAA specifically provides (42 U.S.C. § 7602 (z)) that a building is not a stationary source of pollution simply because it may attract vehicular traffic. Village of Oconomoc Lake v. Dayton Hudson Corp., supra, 24 F.3d at 963. Under § 4.4 of the SIP, if the EIS for a proposed project indicates the potential for exceedance of the CO standard either the project sponsor or the City must take steps to mitigate the problem, with the sponsor responsible for mitigating only those conditions caused by the project, not those traffic problems merely identified in the project EIS. Coalition Against Columbus Center, supra, 967 F.2d at 774-775. At most, any required discretionary government approvals for a project could be denied if an EIS indicated the possibility that traffic attracted by the project could cause CO exceed nces for which mitigation could be problematic. The SIP cannot be rewritten to provide for the outright prohibition of construction of a building that may attract increased traffic and thus indirectly increase CO levels. See Delaware Citizens Council for Clean Air v. Davis, supra, 932 F.2d at

266; Plan for Acadia , Inc. v. Anita Associates, supra, 501 F.2d at 392.

Finally, it should be noted that even if petitioners were correct in their claim that the filing of the attainment demonstration, including the proposed maintenance plan with the New York City procedure, activates presently applicable obligations which constitute a basis for a claim under the citizens' suit provision of the CAA, this matter would not warrant review by this Court under the standards of Rule 10 of this Court. Petitioners' claims do not involve any important question of federal law or any possible conflict with any decision of this Court. Although petitioners claim that this matter raises questions concerning the proper application of Rule 12 (b) (6) Fed.R.Civ.P., it is obvious that the meaning and scope of the SIP and related proposals are questions of law for the court, properly addressed on a Rule 12(b) (6) motion. California Public Interest Research Group v. Shell Oil Co, 840 F.Supp. 712, 718, n. 8, (N.D. Cal. 1993), citing Coalition against Columbus Center v. City of New York, supra, 967 F.2d at 771. Petitioners at most allege a misreading of a SIP and of a related procedure applicable only to New York City, thus there is no possibility that the Second Circuit's construction thereof could result in a ruling in conflict with the position of another Circuit. Even if petitioners' allegations were correct, the nature of the claim of error that they assert does not warrant review by this Court. See Ross v. Moffitt, 417 U.S. 600, 616-617 (1974).

For these reasons, this Court is respectfully urged to deny the petition for a writ of certiorari.

## CONCLUSION

**THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.**

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New York, New York

Respectfully Submitted,

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